Supreme Court, U. S.
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Nos. 78-973, 78-987 and 78-1212

In the Supreme Court of the United States

OCTOBER TERM, 1978

DENNE M. HARRINGTON and GARY D. RONDEAU,
PETITIONERS
v.
UNITED STATES OF AMERICA

WILLIAM T. DOLMAN AND ROY D. WILSON, PETITIONERS
v.
UNITED STATES OF AMERICA

GERALD L. MINNICH and ARTHUR SCHRUDER,
PETITIONERS
v.
UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

WADE H. MCCREE, JR.
Solicitor General

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Petitioners were convicted of criminal contempt of court, pursuant to 18 U.S.C. 401(3), for violation of an

injunction entered by the district court in *United States* v. *Washington*, Civil No. 9213 (W.D. Wash.), to control non-Indian salmon fishing in the waters of western Washington. The validity of that injunction was upheld in *Puget Sound Gillnetters Ass'n* v. *United States District Court*, 573 F. 2d 1123 (9th Cir. 1978), petition for cert. granted, Oct. 16, 1978 (No. 78-139). On their contempt convictions, petitioners were each sentenced to 60 days' imprisonment, but execution of their sentences was stayed pending appeal. The United States Court of Appeals for the Ninth Circuit affirmed petitioners' convictions. *United States* v. *Olander*, 584 F. 2d 876 (9th Cir. 1978). Petitioners now seek review of their convictions in this Court. The sentences of all six petitioners have been stayed by the Ninth Circuit pending final disposition by this Court of the present petitions.[1] For the reasons that follow, the United States respectfully suggests that the Court should hold the petitions for consideration and disposition after the Court has rendered a decision in *Puget Sound Gillnetters Ass'n, supra*.[2]

1. In Nos. 78-987 and 78-1212 the principal issue raised by petitioners Dolman, Wilson, Minnich and Schruder is whether the district court had jurisdiction to enter the injunction against non-Indian fishermen, in light of the fact that they have never been parties to the underlying litigation in *United States* v. *Washington*. That same question is already pending in *Puget Sound*

[1]In response to a motion seeking a stay pending disposition of the petition in No. 78-973, the sentences of petitioners Harrington and Rondeau were stayed by the court of appeals before they commenced serving them. The other four petitioners commenced serving their 60-day sentences before filing the petitions in Nos. 78-987 and 78-1212. Shortly after those petitions were filed, the remainder of petitioners' sentences was stayed by the court of appeals pending this Court's disposition of the petitions.

[2]Together with *State of Washington, et al.* v. *Washington State Commercial Passenger Fishing Vessel Ass'n, et al.* and *State of Washington, et al.* v. *United States, et al.*, Nos. 77-983 and 78-119.

Gillnetters Ass'n, supra. Petitioners suggest (Pet. 15) that the petitions should be granted and the cases consolidated with *Puget Sound Gillnetters*. We believe, however, that consolidation is unnecessary and, further, that it would only serve to delay consideration of *Puget Sound Gillnetters*. Briefing in that case is virtually completed, and argument is scheduled for February 28, 1979. No useful purpose would be served by additional briefing of the same question in the present cases. Accordingly, we suggest that the Court should simply defer consideration of the petitions in Nos. 78-973 and 78-1212 until after it has decided *Puget Sound Gillnetters*.[3]

2. Petitioners in Nos. 78-987 and 78-1212 also ask this Court to review the court of appeals' affirmance of the district court's denial of petitioners' motion to disqualify the district judge. That issue, which is not involved in *Puget Sound Gillnetters*, was thoroughly examined by the court of appeals and, in our view, does not merit review by this Court. Thus, regardless of the outcome in *Puget Sound Gillnetters*, we will urge the Court to deny the petitions insofar as they raise the disqualification issue. If, however, the Court agrees to hold the petitions pending a decision in *Puget Sound Gillnetters*, it would seem more appropriate to present our views on the disqualification issue when the Court is ready to dispose of the entire petitions (see note 3, *supra*).

3. In No. 78-973, the only issue raised by petitioners Harrington and Rondeau is the validity of the 1974 decision in *United States* v. *Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), aff'd, 520 F. 2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976), in which the district court held that certain Indian Tribes are entitled to an opportunity to catch one-half of any run of fish destined

[3]At that time, we will advise the Court of our views on the appropriate disposition of the petitions in light of the decision in *Puget Sound Gillnetters*.

for their usual and accustomed fishing places. Although that question may be reconsidered by this Court in Nos. 77-983 and 78-119, even a reversal of the 1974 decision could not serve as a basis for overturning petitioners' contempt convictions. See *Walker* v. *City of Birmingham*, 388 U.S. 307, 315-320 (1967); *United States* v. *United Mine Workers*, 330 U.S. 258, 293-294 (1947); cf. *Dolman* v. *United States*, No. A-(78-987) (Dec. 21, 1978) (Rehnquist, Circuit Justice). Thus, the petition in No. 78-973 could properly be denied at this time. Nevertheless, since petitioners Harrington and Rondeau are, as a factual matter, in precisely the same circumstances as petitioners in Nos. 78-987 and 78-1212, it seems appropriate to await the decision in *Puget Sound Gillnetters* and, if the outcome in that case warrants it, to consider whether petitioners Harrington and Rondeau may fairly be deemed to have raised the same jurisdictional question presented by petitioners Dolman, Wilson, Minnich and Schruder in Nos. 78-987 and 78-1212. Accordingly, the United States suggests that this petition be deferred for later consideration as well.

CONCLUSION

It is therefore respectfully submitted that consideration and disposition of the petitions for a writ of certiorari should be deferred pending this Court's decision in *Puget Sound Gillnetters Ass'n* v. *United States District Court*, No. 78-139, and related cases.

WADE H. MCCREE, JR.
Solicitor General

FEBRUARY 1979

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